IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-779

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974

—and—

CHARLES LONG, PASQUALE DE ROSA, ALBERT ZAPPY, HARRY EDWARDS and ANTHONY DEL GAIS, each of them individually and on behalf of all other persons, members of Local 1974 working or seeking work as drywall tapers within the jurisdiction of such labor organization, similarly situated,

Petitioners,

—against—

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, OPERATIVE PLASTERERS LOCAL 60, OPERATIVE PLASTERERS LOCAL 202 and OPERATIVE PLASTERERS LOCAL 852,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit of June 29, 1979, affirming the dismissal, by the United States District Court for the Southern District of New York, of the Complaint in this action.

Opinions Below

The Opinion of the Court of Appeals for the Second Circuit of June 29, 1979, referred to hereinafter as *Drywall Tapers II,* is reported at 601 F.2d 675 and appears *infra* in Appendix at page 1a.

The Opinions of the District Court of May 1, 1978 and June 13, 1978, dismissing the Complaint herein, are unreported and appear *infra* in Appendix at pages 11a and 17a, respectively.

The Opinion of the Court of Appeals for the Second Circuit of June 18, 1976 referred to hereinafter as *Drywall Tapers I* is reported at 537 F.2d 669 and appears *infra* in Appendix at page 19a.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1979. A timely petition for rehearing and for rehearing en banc brought by Petitioners was denied on August 21, 1979. This petition for certiorari was filed within ninety days of the latter date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and in accordance with Supreme Court Rule 19(b).

Questions Presented

1. Should a federal court enforce an arbitral panel's decision purporting to dispose of claims and controversies that were not submitted to the arbitral panel for decision?

2. Does the national policy expressed by Congress in the National Labor Relations Act mandate federal courts to accept and affirm an arbitral panel's decision purporting to dispose of jurisdictional claims and controversies between unions that were not submitted to the Panel for decision and are not so related to the issue that was submitted as to be resolved or rendered moot by the panel's decision on the submitted question?

3. When suit for violation of an inter-union jurisdictional agreement has been properly brought in federal court under §301(a) of the LMRA, 29 U.S.C. §185(a), should the court dismiss such suit in obedience to a hearings panel's subsequent ruling that no relief is warranted for such violation, even though the issues of such violation and of the relief warranted therefor have not been submitted to the panel for decision?

Statutes Involved

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a), provides as follows:

> (a) Venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, or between any such labor organizations, may be

brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 10(k) of the National Labor Relations Act as amended, 29 U.S.C. §160(k), provides as follows:

(k) Hearings on jurisdictional strikes. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. §173(d), provides as follows:

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Statement of the Case

This suit was brought under §301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a), for violation by Respondent unions ("Plasterers") of a jurisdictional agreement between Plasterers' international and the parent international ("Painters") of Petitioner Local 1974. The jurisdictional agreement violated by Plasterers, known as the Memorandum of Understanding of November 29, 1961 (or the "1961 Memorandum") (J.A. 186a-192a),[1] assigns all drywall taping work to Painters, except where the walls are to receive a plaster, acoustical or imitation acoustical finish (J.A. 191a). The Complaint alleges that Plasterers violated the 1961 Memorandum by performing drywall taping work on walls not to receive such finishes (J.A. 12a-19a).

The background facts are set out in the first (1976) Opinion of the Court of Appeals in this case, referred to here as *Drywall Tapers I,* 537 F.2d 669, reprinted *infra,* App. 19a and in J.A. 393A. Local 1974 first exhausted its remedies under the Plan of the AFL-CIO's Building and Construction Trades Department (or "Department"). These called for submission of the disputes to the Impartial Jurisdictional Disputes Board (or "Impartial Board") set up by the Plan (J.A. 64a, 66a). Under the Plan, the Impartial Board is authorized to resolve job disputes between unions by applying a body of jurisdictional law known as "the record,"

[1] The initials "J.A." refer to the Joint Appendix in the Court of Appeals, one copy of which (two volumes) is forwarded to the Court with this Petition for Certiorari. Page numbers bearing a lower-case "a" refer to the first volume; those bearing a capital "A" refer to the second.

consisting of jurisdictional agreements and "decisions of record" (Art. VI, §3; J.A. 66a). If "the record" does not cover the dispute, the Impartial Board makes a "job decision" resolving it. Such "job decisions" do not become part of "the record," however; they are limited to the particular dispute at the particular job (J.A. 66a).

The Impartial Board, however, was barred by a 1973 directive from considering any dispute concerning drywall taping (see: App. 23). Accordingly, it refused to hear the job disputes in question. Having exhausted, by appeal to the Impartial Board, all remedies available to it under the Plan, Local 1974 had no choice but to bring suit in District Court (in 1975) for violation of the 1961 Memorandum.

Plasterers, in opposition to Local 1974's motion for preliminary injunction, argued that the 1961 Memorandum was not in effect and that an earlier, 1947 "decision of record" gave jurisdiction to it. In order to resolve this underlying issue, the District Court ordered the parties to petition to the Joint Administrative Committee (or "JAC"), pursuant to the Plan, for referral of that underlying issue to a Hearings Panel. Plasterers at first failed to do so but, ultimately, both parties so petitioned: Local 1974 immediately and Plasterers after a preliminary injunction had issued in March 1976.

Plasterers then appealed from the issuance of the preliminary injunction, which restrained it from violating the 1961 Memorandum. In June 1976 the Court of Appeals, in *Drywall Tapers I* (App. 19a), affirmed the issuance of the injunction and specifically approved the District Court's finding of Local 1974's probable success on the merits (App. 28).

The two unions submitted to the Panel only the underlying issue. Painters characterized it as "the present applicability of the 1961 Memorandum," and emphasized that this was the only issue submitted and the only one as to which Painters would be bound (J.A. 327a). Plasterers argued that the 1947 "decision of record" should be considered also (J.A. 731A).

In June 1977, apparently prompted by the Impartial Board's decision of a job dispute arising in New Jersey (J.A. 583A), JAC responded to the two submissions (J.A. 731A) by establishing a Hearings Panel. The Panel framed the issue submitted to it as "the pointing and taping of drywall surfaces" (J.A. 582A). The parties accepted the new formulation.

The Plan provides that when job disputes of a particular kind are "repetitive," an effort shall be made to resolve the underlying issue. The unions are first directed to try to reach a national agreement covering that issue; if they fail, a Hearings Panel is established (Art X, §2; J.A. 70a-71a). Hearings Panel decisions are therefore substitutes for national agreements; they become "decisions of record" and, along with national agreements, comprise "the record" to be applied, by the Impartial Board, to future job disputes. But only to future ones. As the Plan says of national agreements (Art. XII, §2; J.A. 72a), they "shall take effect prospectively and shall not apply to jobs in process at the time of execution."

In its "Preliminary Rulings" of May 16, 1977, the Hearings Panel announced that it would not consider any job disputes. This extended even to the New Jersey dispute that had occasioned the referral. The Panel

noted that in that one case (though not in any other[2]) it could consider an "appeal" from the Impartial Board's decision along with the "broader" issue referred to it. But the Panel said that it would not do so. It declared that it was not its function to "substitute itself" for the Impartial Board or to "constitute an appellate body on any individual case which has been decided by the Impartial Board." J.A. 583A-584A. With this clear announcement of the Panel's limited jurisdiction, the Panel announced hearings to be held (and which were held) in June 1977 on the "broader" issue.

The Panel handed down its decision on March 1, 1978—two and one-half years after this suit had been instituted. It upheld the applicability of the 1961 Memorandum and ruled that all drywall taping work on walls that were not to receive a plaster, acoustical or imitation acoustical finish belonged to Painters (the parent international of Local 1974), with the exception, not relevant here, that where a "skim coat" of plaster material is to be applied to a wall this shall be deemed a plaster finish, giving the work to Plasterers (J.A. 625A). On the submitted issue, therefore, it ruled for Painters and thus for Local 1974.

Under the heading "Discussion" (J.A. 620A), in a section preceding the operative portion of its decision (J.A. 624A), the Panel discussed ten separately-numbered matters bearing upon its decision. As to the ninth of these matters, the Panel said (at J.A. 624A):

[2] In actuality, there was no other, since the Impartial Board had not decided any drywall taping dispute, except for the New Jersey one, since 1973.

"(9) The decision herein made by the Hearings Panel is not to be construed as a finding that any assignment of the work in the past was required to be in conformance with this decision. This is a decision *de novo* to settle a controversy for the future. All future assignments made on or after 30 days from the date of this decision shall be in accordance with this decision, as provided by Article X, Sec. 4, of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry.

"This decision, now supersedes and renders moot all controversies arising out of past assignments, and this decision contains full and final relief for all claims, both past and present, of all persons affected by this controversy and no further relief whatsoever is warranted."

On the basis of the second of the two quoted paragraphs, Respondents moved in the District Court to dismiss the action. Petitioners argued that, if that paragraph be deemed to constitute a ruling by the Panel, the same was in excess of the Panel's authority and should be declared void. The District Court, rejecting Petitioners' argument, dismissed the action (App. 15a; J.A. 652A). The Court of Appeals affirmed (App. 8a; *Drywall Tapers II,* Slip Op. p. 3562, 601 F.2d at 678), implicitly acknowledging the excess but holding that the Congressional policy laid down in the National Labor Relations Act mandated judicial acceptance of the Panel's decision. It is from that holding that this petition for certiorari is taken.

THE REASON FOR GRANTING A WRIT

I.

The Decision of the Court of Appeals Is in Conflict With This Court's Decisions in the Steelworkers' Trilogy.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. It has ruled that the Congressional policy expressed in the National Labor Relations Act mandates judicial acceptance of a Hearings Panel's decision disposing of claims and controversies that were not submitted to the Panel for decision and are not so related to the issue that was submitted as to be resolved or rendered moot by the Panel's decision of the submitted question.

The Hearings Panel involved here is not empowered by the Plan to decide job disputes. It is empowered to decide only "broader" questions of jurisdiction: i.e., questions of jurisdictional law, as to which international union shall have jurisdiction over which types of work. That is the only type of question it has ever had authority to decide. The only question submitted to it in this instance was of that type.

Deciding job disputes is, under the Plan, the exclusive prerogative of the Impartial Board. The Impartial Board's function is to apply the agreements and decisions "of record"—i.e., the jurisdictional law created by the various Hearings Panels and agreements in the past—to specific jobsite controversies and claims and, by so doing, to resolve those controversies.

The Hearings Panel is not empowered to perform that function. It made this limitation clear, before it

heard argument on the question that had been submitted to it, in its "Preliminary Rulings" of May 16, 1977, where it announced (at J.A. 584A) that

> ". . . [I]t is not the function of the Hearings Panel to substitute itself for the Impartial Board. Nor does a Hearings Panel constitute an appellate body on any individual case which has been decided by the Impartial Board."

No job dispute was submitted to the Hearings Panel for decision. The only issue submitted was the question, which of the two unions should have jurisdiction over drywall taping.

The Panel awarded drywall taping jurisdiction to Painters. Thus, far from "mooting" Local 1974's claims, its decision on the submitted question strengthened them. But the Panel went on in its decision to declare that all claims and controversies arising out of past assignments of drywall taping work were now "moot" and that no relief was warranted for any of them. In so doing, the Panel ruled upon disputes that had not been submitted to it, had not been argued before it, and over which it had no jurisdiction.

Thus the decision of the Court of Appeals in upholding that part of the Panel's decision is in conflict with this Court's decisions in the *Steelworkers' Trilogy* of 1960; specifically, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, and *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574. As this Court remarked in *Enterprise, supra,* 363 U.S. at 597-598, the arbitrator there would have

"abused the trust the parties confided in him" if he had "not stayed within the areas marked out for his consideration" and had, as the Hearings Panel did here, "exceeded the scope of the submission." For, as the Court remarked in *Warrior & Gulf, supra,* 363 U.S. at 582, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." And see: *American Mfg. Co., supra,* 363 U.S. at 570-572 (conc. op.), where Mr. Justice Brennan cautioned that, "since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table whether the parties have agreed to arbitrate the particular dispute."

The Court of Appeals recognized the issue presented here, when it noted the argument of Appellants (Petitioners here), "that the portion of the Panel's decision which purported to dispose of all claims was in excess of its authority" and that "no specific job dispute or claim had been submitted to the Panel"; App. 7a, Slip Op. p. 3561, 601 F.2d at 678. However, the Court responded with the broad assertion, App. 8a, Slip Op. p. 3562, 601 F.2d at 679, that

> ". . . . the national policy expressed by Congress in enacting the National Labor Relations Act (29 U.S.C. §173(d)) favoring the resolution of jurisdictional disputes by submission of them to arbitration mandates our acceptance and affirmance of the Hearings Panel decision here."

It thus implicitly acknowledged the Panel's excess of authority but held that judicial approval thereof is mandated by the national labor policy.

It may be noted that the Court of Appeals, in citing 29 U.S.C. §173(d), cites a provision of the Labor-Management Relations Act which has nothing to say about jurisdictional disputes between unions or their submission to arbitration. §173(d) relates only to grievances arising under collective bargaining agreements, between employer and union. The national policy favoring submission of union jurisdictional disputes to arbitration derives not from §173(d) but from §10(k) of the National Labor Relations Act as amended, 29 U.S.C. §160(k). See: *Carey v. Westinghouse,* 375 U.S. 261, 266 (1964). The Court's error on this point may have affected its decision, since the language of §173(d) ("final adjustment") is less explicitly in conflict with its holding than that of §160(k) ("voluntary adjustment"). Insofar as arbitration is a road to *voluntary* adjustment, the policy of §160(k) mandates rejection, not "acceptance and affirmance," of an arbitrator's decision upon any question not submitted to him. Only assurance that an arbitrator will stay within the areas marked out for his consideration can encourage union submission to such a means of voluntary adjustment.[3] In short, the Congressional policy at issue here, once it is properly traced to §160(k), mandates a result directly contrary to that of the Court's decision.

To support its holding, the Court cites three unobjectionable but inapposite principles of arbitration law: first, that the function of a reviewing court as to issues

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[3] Absence of such assurance would appear to be one reason why, as counsel for Plasterers candidly conceded, "no international union would want to go to a hearings panel"—with the result that "this is only the second hearings panel in 25 years." See: Remarks of MR. CAPUANO, at J.A. 472.

that have been submitted to arbitration is "very limited"; next, that an arbitrator should have the "broadest jurisdiction"; and finally that an arbitrator does not *a fortiori* exceed his authority if he "take[s] cognizance" of issues beyond those presented. App. 9a, Slip Op. p. 3563, 601 F.2d at 679. But none of those principles is applicable here. In this instance, the arbitral panel not only "t[ook] cognizance" of issues not submitted to it but purported to decide them.

The Court below upheld the Panel's decision not on the basis of a particular or peculiar view of the Panel's authority, or the nature of the decision, but upon a broad principle of national policy. Its holding is that Congress's policy, expressed in the National Labor Relations Act, *mandates* judicial acceptance of a Hearings Panel's decision disposing of jurisdictional job disputes that were not submitted to the Panel for decision.

That principle is in sharp and fundamental conflict with the principles that this Court laid down in the *Steelworkers Trilogy*. The conflict requires to be resolved. Such resolution is rendered all the more urgent by the substantial increase, in recent years, of union jurisdictional disputes, especially in the construction industry. In order that the conflict may be resolved, a writ should be granted.

II.

The Court of Appeals has Misapplied the Principles of *English v. Cunningham*.

One secondary question must be dealt with. The Opinion of the Court of Appeals buttresses its holding by referring to what it terms, "JAC's interpretation of

the Plan as to the exclusivity of its procedures . . . and the authority of the Hearings Panel"; App. 9a, Slip Op. p. 3563, 601 F.2d at 679.

JAC made no such interpretation. Nor, in its brief *amicus curiae* in the Court of Appeals, did JAC make any reference to the supposed interpretation. However Plasterers, in their brief, argued that JAC had made such an interpretation, citing a letter from Georgine, JAC's Chairman, to Raftery, president of Painters, rebuking Raftery because Local 1974 (Petitioner here) had, in the District Court, challenged the Panel's decision.

Georgine's letter, though undated (J.A. 719A-721A), obviously post-dates the Panel's decision. If an "interpretation" relative to the Panel's authority, it is plainly after-the-fact. But even if it be treated as an "interpretation" of the Plan, the principles of *English v. Cunningham*, 283 F.2d 848, 850 (D.C. Cir. 1960) (to which the Court below declared its adherence) require its rejection. Those principles direct that judicial acceptance of a governing body's "interpretation" of a union constitution be limited to the extent that the governing body is *authorized* by the constitution to interpret it and that the interpretation is *reasonable*. Here, neither requirement is met.

Nothing in the Plan or in any other document authorizes JAC or its Chairman to make an interpretation of the Plan or of the authority of a Hearings Panel. Nor is the "interpretation" offered a reasonable one. The plain terms of the Plan indicate that Hearings Panel is not empowered to decide job disputes—a fact emphasized by the Panel itself in its Preliminary Rulings of May 16, 1977 (J.A. 584A).

Thus the rule of *English v. Cunningham* requires that JAC's (or Georgine's) supposed "interpretation" be rejected. See: *Pignotti v. Local #3 Sheet Metal Workers Int'l Ass'n,* 477 F.2d 825, 831 (8th Cir. 1973), cert. den. 414 U.S. 1067.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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November 19, 1979

APPENDIX

Opinion of the United States Court of Appeals in *Drywall Tapers II*, of June 29, 1979

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 398—August Term, 1978.

(Argued December 15, 1978 Decided June 29, 1979.)

Docket No. 78-7352

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

—and—

CHARLES LONG, *et al.*, individually, etc.,

Appellants,

—v.—

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, *et al.*,

Appellees.

Before:

WATERMAN, MANSFIELD and OAKES,

Circuit Judges.

Appellants seek reversal of decision below, S.D.N.Y., Metzner, *J.*, dismissing their complaint for breach of contract and dissolving a preliminary injunction previously entered against appellees.

Judgment below *affirmed.*

BURTON H. HALL, New York City, *for Appellants.*

DONALD J. CAPUANO, Washington, D.C. (O'Donoghue & O'Donoghue, Robert Matisoff, Washington, D.C.; Cohen, Weiss and Simon, Robert S. Savelson, New York City), *for Appellees OPCMIA and Locals 202 and 852.*

MIRKIN, BARRE, SALTZSTEIN & GORDON, P.C., Jeffrey Kreisberg, Great Neck, New York, *for Appellee OPCMIA Local 60.*

THOMAS X. DUNN, RICHARD M. RESNICK, Washington, D.C. (Sherman, Dunn, Cohen & Leifer, Washington, D.C., of counsel), *for Amicus Curiae Joint Administrative Committee of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry.*

WATERMAN, *Circuit Judge*:

Plaintiffs below, Drywall Tapers and Pointers of Greater New York, Local 1974 and certain individual members (Painters), appeal from a memorandum decision of the United States District Court for the Southern District of New York (Metzner, *J.*) dismissing their complaint for breach of contract under § 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)) and dissolving a preliminary injunction previously entered against defendants Operative Plasterers' and Cement Masons' International Association (Plasterers). The district court determined that the dispute was a jurisdictional dispute involving the issue of whether the performance of a certain construction process was actually a job for Painters or for Plasterers, and concluded that the issue having been fully resolved pursuant to established industrial arbitration pro-

cedures there was no reason to entertain the lawsuit. We affirm the district court.

The dispute concerns the usage of "Sta-Smooth," a taping and pointing material, and whether its use falls within the work province of Painters or Plasterers. Both Painters and Plasterers are members of the Building and Construction Trades Department of the AFL-CIO (Department) and are, therefore, bound by its arbitral and administrative procedures. In 1947 the Department issued a decision of record[1] which assigned taping and pointing work by the nature of the material used—plasterers did work involving plaster materials and painters did work involving adhesive materials. In 1961, however, Plasterers and Painters were signatories to a Memorandum of Understanding (Memorandum) which classified all pointing and taping, regardless of the material used, as painters' work, so long as the drywall surfaces were not to receive plaster or acoustical finishes. The 1961 Memorandum was to supersede all prior understandings or agreements. The 1947 decision of record and the 1961 Memorandum embody the jurisdictional definitions with which we are concerned in the present lawsuit.

The "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry" (Plan) governs the manner in which disputes over work assignments were to be settled. The signatory parties to the Plan, and who have agreed to be bound by it, are, on the one hand, the

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1 The 1947 decision of record is reported in the Green Book, Plan for Settlement of Jurisdictional Disputes in the Construction Industry, at pp. 144-45. The decision states in pertinent part:

> When plaster material is used to do pointing and filling it shall be the work of members of the Operative Plasterers and Cement Finishers International Association . . .
>
> When adhesive materials are used it shall be the work of members of the Brotherhood of Painters . . .

Department on behalf of its affiliated unions, and on the other hand, ten employer associations on behalf of their members. The Joint Administrative Committee, composed of representatives of labor and management, oversees the operation of the Plan. A dispute over a work assignment is first presented to a local board, whose decision is appealable to the Impartial Jurisdictional Disputes Board (Disputes Board) of the Department. A Disputes Board decision may then be appealed to the Appeals Board. The Joint Administrative Committee (JAC) oversees the Appeals Board and has authority under the Plan to certify as "repetitive" certain jurisdictional issues. A repetitive issue is first referred to the Presidents of the International Unions for resolution; and, in the event no settlement is reached within 90 days, the issue is referred to a Hearings Panel for a national decision binding on all member Unions.

In December 1973, JAC certified the issue of entitlement to prefinishing taping and pointing work to the Unions for resolution and instructed the Disputes Board to defer action on all appeals involving that jurisdictional issue. Prior to this time, relying on the 1961 Memorandum, the Disputes Board had, during a three-month period in 1973, resolved at least ten separate jurisdictional disputes. Both Painters and Plasterers protested the deferral order issued by the JAC, and, in response to their protests, received assurances from JAC that the matter would be considered at its next meeting.

In March 1975 Painters requested arbitration of the dispute concerning the assignment of prefinishing work by the local arbitration board under the New York Plan, the Building Trades Employers' Association (BTEA). BTEA determined, without reference to the 1961 Memorandum, that "Sta-Smooth" was a plaster material and, therefore,

by virtue of the 1947 decision of record, it was within the work province of Plasterers. Painters appealed the BTEA decision to the Disputes Board, which initially agreed to hear the appeal but later postponed the hearing. The Disputes Board ultimately refused to entertain the appeal because at the time Painters requested an appeal they were unilaterally pursuing the question of entitlement to the "Sta-Smooth" work in a collateral arbitration under a collective bargaining agreement. The Disputes Board held that the Painters, by pursuing collateral arbitration, were in violation of Article III, § 5 of the Plan, which prohibits a union from establishing work jurisdiction on a unilateral basis.

Inasmuch as the Disputes Board continued to defer all appeals involving the entitlement to "Sta-Smooth" work and JAC failed to refer the issue to the Hearings Panel, the Painters initiated this action on August 28, 1975, for a declaratory judgment, specific performance of the 1961 Memorandum, an injunction restraining Plasterers from performing Painters work, and both punitive and compensatory damages. Simultaneously, Painters moved for a preliminary injunction restraining Plasterers from asserting jurisdiction over the taping and pointing of drywall surfaces that were not to receive plaster or acoustical finishes. On November 5, 1975, the district court issued an order denying Painters' motion on the ground that the jurisdictional dispute had been certified as a repetitive question and had been referred to the Unions for settlement. Accordingly, the district court directed the parties to petition the JAC to seek referral of the dispute to the Hearings Panel. The court cautioned, however, that the motion for a preliminary injunction could be renewed upon a showing that the Plasterers were not cooperating in resolving the dispute through the Plan. In January 1976,

after petitioning the JAC for an immediate referral of the jurisdictional question, Painters renewed their motion for the court to issue a preliminary injunction. The district court, finding that it was likely that the 1961 Memorandum was controlling and that Painters would prevail on the merits, granted the motion, and thereby restrained the Plasterers, regardless of the material used, from performing drywall taping and pointing work on surfaces that were not to receive plaster or acoustical finishes. This court affirmed the issuance of the preliminary injunction although deeming it appropriate to limit it to the geographical area of Local 1974 only. *Drywall Tapers and Pointers of Greater New York, Local 1974 v. Operative Plasterers' and Cement Masons' International Association,* 537 F.2d 669 (2d Cir. 1976).

On February 1, 1977, the Hearings Panel conducted a preliminary hearing; and further hearings on the merits were scheduled for June 29 and 30. The Panel issued its decision on March 1, 1978. It held that, despite the contentions of both parties, there was no inconsistency between the 1947 decision of record and the 1961 Memorandum, concluding that the 1961 Memorandum was an attempt to clarify, in light of technological changes in the industry, the proper definition of work established by the 1947 decision of record. The Panel also concluded that its decision on the merits of the dispute had rendered moot all the controversies which had arisen out of past assignments and had granted full relief for all claims past and present of persons affected by the controversy.[2]

2 The Hearings Panel decision on the pointing and taping of drywall held:

(1) All pointing and taping, regardless of material used, is painters' work, provided the drywall surfaces are not to receive plaster, acoustical or imitation acoustical finishes.

Shortly after the Hearings Panel handed down its decision, the Plasterers moved in the district court to dismiss the complaint and to dissolve the preliminary injunction which had been entered there on the ground that the Panel's decision completely resolved the controversy in court. Claiming that as a Panel decision may give prospective relief only and may neither grant relief for past violations nor deny persons adversely affected by violations the right to pursue judicial relief, Painters argued in opposition to the motion that the portion of the Panel's decision which purported to dispose of all claims was in excess of its authority. Painters also argued that no specific job dispute or claim had been submitted to the Panel. The district court rejected Painters' argument, stating that it was "clearly contrary to the Constitution and Plan." The court, holding that there was no reason to continue the lawsuit inasmuch as the Hearings Panel, by virtue of Article X[3] of the Constitution of the Department, clearly had

(2) Pointing and taping, regardless of material used, of drywall surfaces which are to receive plaster, acoustical or imitation acoustical finishes shall be the work of plasterers.

(3) The surface produced by the application of the same plaster pointing material as used in the pointing and taping of the joints to the entire drywall surface for the purpose of producing a uniform surface compatible with the pointed and taped joints shall be considered a plaster finish, and the pointing and taping in connection therewith shall be the work of plasterers.

The Hearings Panel further stated in its decision that:

This decision, now supersedes and renders moot all controversies arising out of past assignments, and this decision contains full and final relief for all claims, both past and present, of all persons affected by this controversy and no further relief whatsoever is warranted.

3 Article X, of the Constitution of the Building and Construction Trades Department, AFL-CIO, is entitled "Jurisdictional Disputes." It reads as follows:

All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers

the authority to dispose of the dispute and resolve the issue of the applicability of the 1961 Memorandum as well as the issue of whether a certain construction process was a job for painters or plasterers, granted Plasterers' motions. Similarly, the court found that Article VIII, § 2[4] of the Plan, established pursuant to the constitution, made it clear that the Plan is the exclusive method for resolution of jurisdictional disputes. Article X of the Plan establishes that any decision by a Hearings Panel convened under the Plan must be immediately accepted and complied with by all parties to the Plan.

We find that, notwithstanding the long delays and the maladministration of the Plan, the national policy expressed by Congress in enacting the National Labor Relations Act (29 U.S.C. § 173(d)) favoring the resolution of jurisdictional disputes by submission of them to arbitration mandates our acceptance and affirmance of the Hearings Panel decision here. In so doing we are not unmindful of our obligation to give "meaningful" judicial review to

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shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. *Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.* (emphasis supplied)

4 The Plan for the Settlement of Jurisdictional Disputes in the Construction Industry, Article VII, § 2(a) and (h), states:

(a) The Department and each of its affiliated Unions agree that all cases, disputes or controversies involving jurisdictional disputes and assignments of work arising hereunder shall be resolved as provided herein and shall comply with the decisions and awards of the Board, or Hearings Panel established hereunder.

• • •

(h) It is further agreed that, if the parties hereto comply with all of the provisions of this Agreement relating to Article VIII, they shall be relieved of all other liability arising therefrom . . .

the questions of whether an arbitral panel exceeded its authority; *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steeworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960) [Steelworkers Trilogy]; but we also note that the function of the court is very limited when the parties, as in the present controversy, have agreed to submit questions of contract interpretation to an arbitrator or Hearings Panel, as the case may be. Steelworkers Trilogy, *supra.* As we have previously stated, ". . . courts must uphold the arbitrator in the exercise of the broadest jurisdiction in the absence of specific contractual limitations on that jurisdiction . . ." *Local 453, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Otis Elevator Co.*, 314 F.2d 25, 28 (2d Cir.), *cert. denied*, 373 U.S. 949, 83 S.Ct. 1680 (1963).

Therefore, arbitral bodies or Hearings Panels, when attempting to do justice and to reach workable solutions, do not *a fortiori* exceed their authority because they take cognizance of issues beyond those presented by the parties. *Sheet Metal Workers' International Union, AFL-CIO, Local Union 17 v. Aetna Steel Products Corp.*, 359 F.2d 1 (1st Cir.), *cert. denied*, 385 U.S. 839, 87 S.Ct. 86 (1966).

In view of JAC's interpretation of the Plan as to the exclusivity of its procedures for the resolution of jurisdictional disputes, and the authority of the Hearings Panel, we adhere to the view articulated in *English v. Cunningham*, 283 F.2d 848, 850 (D.C.Cir. 1960), that "courts will accept the correctness of an interpretation fairly placed on union rules by the union's authorized officials." *See also Local Union No. 657 of the United Brotherhood of Car-*

penters and Joiners of America of Sheboygan County v. Sidell, 552 F.2d 1520 (7th Cir.), *cert. denied*, 434 U.S. 862, —— S.Ct.—— (1977); *Vestal v. Hoffa*, 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied*, 406 U.S. 934, 92 S.Ct. 1768 (1972).

The decision of the district court dismissing the complaint and dissolving the preliminary injunction is hereby AFFIRMED.

Opinion of the United States District Court, Southern District of New York, of May 1, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974, -and- CHARLES LONG, et al., Plaintiffs, -against- OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, etc., et al., Defendants.	COPY 75 Civ 4289 (CMM) #47172

METZNER, D.J.

This is an action involving a jurisdictional dispute between labor unions concerning job assignments for one aspect of building construction. Federal jurisdiction is based upon section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). There is no need to discuss here further the background of this litigation as it is fully set forth in the Second Circuit's opinion of June 18, 1976, reported at 537 F.2d 669, and this court's opinion of January 10, 1977.

Plaintiffs move to renew their application to hold defendant Operative Plasterers and Cement Masons International Association Local Union 202 (Local 202) and Prince

Carpentry, Inc. (Prince), a nonparty building contractor who is subject to this court's preliminary injunction issued on March 12, 1976 (the injunction), in contempt for alleged violations of the injunction.

Defendant Operative Plasterers and Cement Masons International Association (the Plasterers) and its affiliate, defendant Plasters Local Union 60 (Local 60), move to dismiss the complaint in this action and to dissolve the injunction. Local 202 joins in this motion and further moves to deny and vacate plaintiffs' application to hold it in contempt for alleged violations of the injunction. Prince has filed a separate motion also seeking to have the injunction dissolved and to deny and vacate plaintiffs' application to hold it in contempt for alleged violations of the injunction.

On January 10, 1977, this court issued an opinion stating that plaintiffs' motion to hold Prince and Local 202 in contempt would be held in abeyance pending resolution of the issues through the unions' administrative procedures. On March 1, 1975, the Hearing Panel convened by the Joint Administrative Committee of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan) issued its decision in this matter. The Hearing Panel was the last rung of the unions' administrative ladder, and all of the instant motions are a direct result

of the Hearing Panel's decision.

The Hearing Panel, in summarizing its decision, said:

> #1 All Pointing and taping, regardless of material used, is painters' work, provided the drywall surfaces are not to receive plaster, acoustical or imitation acoustical finishes.
>
> 2 Pointing and taping, regardless of material used, of drywall surfaces which are to receive plaster, acoustical or imitation acoustical finishes shall be the work of plasterers.
>
> 3 The surface produced by the application of the same plaster pointing material as used in the pointing and taping of the joints to the entire drywall surface for the purpose of producing a uniform surface compatible with the pointed and taped joints shall be considered a plaster finish, and the pointing and taping in connection therewith shall be the work of plasterers.

The Hearings Panel further stated in its decision that:

> "This decision, now supersedes and renders moot all controversies arising out of past assignments, and this decision contains full and final relief for all claims, both past and present, of all persons affected by the controversy and no further relief whatsoever is warranted."

Defendants argue that this settles the entire lawsuit; plaintiffs argue that the Hearings Panel exceeded its authority in rendering such a decision.

The Hearing Panel's authority stems from the Constitution of the Building and Construction Trades

Department of the AFL-CIO (the Constitution which provides that all jurisdictional disputes among member unions are to be settled according to a plan established by that department. Article X of the Constitution further provides that any such plan established shall be binding upon all the member unions. Similarly, Art. VII, § 2 of the Plan established pursuant to the Constitution also makes it clear that any decision by a Hearings Panel convened pursuant to the Plan is binding upon the union:

> " Each of its affiliated Unions agree that all cases, disputes or controveries involving jurisdictional disputes and assignments of work arising hereunder shall be resolved as provided herein and shall comply with the decisions and awards of the Board, or Hearing Panel established hereunder."

Plaintiffs contend that this only means that the Hearing Panel has authority to issue decisions establishing what the jurisdiction of the member unions will be in the future but that the Hearing Panel has no authority to consider any alleged past jurisdictional violations or issue relief for such past violations. The court cannot agree with this view, which is clearly contrary to the Constitution and Plan. If plaintiffs' position is followed, it would mean that the internal administrative procedures of the union could never be used to settle jurisdictional disputes between unions, and each time a dispute arose the aggrieved union could only seek relief in the courts.

The resolution of inter-union jurisdictional disputes should properly be left to the unions themselves. As this court stated in its opinion of November 5, 1975: "It is clear from (the Unions) highly-developed and sophisticated arbitration structure that no jurisdictional dispute between members of the Department should ever reach the courts." The court went on to note that the only reason the instant law suit was in the court was because of a "breakdown" in the normal arbitration procedures, despite the good faith efforts of plaintiffs.

That is no longer the case, as the procedures have now been followed and a decision by the Hearing Panel has been rendered. Since the court finds that the Hearing Panel had the authority to dispose of the dispute, and that the issue of the validity of the 1961 Memorandum of Understanding and the issue of whether a certain construction process was actually a job for the plasterers or the painters were both considered and discussed by the Hearing Panel in its decision, the court finds there is no reason for continuing this lawsuit. Now that the Hearing Panel has rendered a decision, the unions are required to abide by it. If defendants fail to abide by it, there are administrative procedures to force compliance or, if need be, plaintiffs can file a new action to enforce the decision as it

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would an arbitration award. Santos v. District Council. 547 F.2d 197 (2d Cir. 1977).

Accordingly, the motions by defendents the Plasterers, Local 60 and Local 202 and Prince are granted and the motion by plaintiffs is denied. The injunction is dissolved and the complaint is dismissed.

So ordered.

Dated: New York, N.Y.
May 1, 1978

CHARLES M. METZNER
U.S.D.J.

Opinion of the United States District Court, Southern District of New York, of June 13, 1978

Drywall Tapers and Pointers of Greater New York, Local 1974, and Charles Long, et al. v. Operative Plasterers and Cement Masons Int'l Assoc., etc., et al.
75 Civ. 4289 (CMM)

Plaintiffs move for reargument of the court's opinion and order of May 2, 1978, in which the court dismissed the complaint in this action and dissolved the preliminary injunction. This motion for reargument is granted.

Plaintiffs raise three arguments on this motion: (1) that the decision of the Hearing Panel could not be a basis for the dismissal of this action; (2) that even if the action is dismissable, plaintiffs are entitled to damages during the period that the preliminary injunction was in force; (3) that the preliminary injunction should not be dissolved until there is a showing that such an injunction is no longer required.

Plaintiffs' first argument was examined on the original motion and found not to be convincing. The court need not discuss it again at this time.

Plaintiffs' second argument was implicitly dealt with in the court's opinion of May 2, 1978. Although a preliminary injunction was in fact issued, it was issued only because the normal union machinery

for resolving the dispute was not functioning in the manner that it was designed to function. Throughout this entire lawsuit the court had made it abundantly clear that it thought this dispute should be resolved by the AFL-CIO. The Court of Appeals agreed with this observation. 537 F.2d 669, 671 (2d Cir. 1976). That is why the hearing on plaintiffs' contempt motion was terminated pending resolution of the dispute by the Hearing Panel. Now that the Hearing Panel has rendered a binding decision, the court will not entertain a motion to continue the contempt hearings. The court's original decision dissolving the preliminary injunction will stand.

Plaintiffs' third argument is similarly not persuasive for the reasons discussed above.

Upon reargument the court adheres to its opinion and order of May 2, 1978.

So ordered.

Dated: New York, N. Y.
June 13, 1978

Charles L. Brieant
U. S. D. J.

Opinion of the United States Court of Appeals in *Drywall Tapers I*, of June 18, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1075—September Term, 1975.

(Argued April 28, 1976 Decided June 18, 1976.)

Docket No. 76-7108

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

and

CHARLES LONG, PASQUALE DE ROSA, ALBERT ZAPPY, HARRY EDWARDS and ANTHONY DEL GAIS, each of them individually and on behalf of all other persons, members of Local 1974 working or seeking work as drywall tapers within the jurisdiction of such labor organization, similarly situated,

Plaintiffs-Appellees,

v.

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, OPERATIVE PLASTERERS LOCAL 60, OPERATIVE PLASTERERS LOCAL 202, and OPERATIVE PLASTERERS LOCAL 852,

Defendants-Appellants.

Before:

LUMBARD, WATERMAN and MESKILL,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge,* which granted plaintiffs a preliminary injunction in a jurisdictional dispute between labor unions.

Affirmed.

GLENN V. WHITAKER, Washington, D. C. (Donald J. Capuano, O'Donoghue & O'Donoghue, Washington, D. C., Robert S. Savelson, Cohen, Weiss and Simon, New York, New York, of counsel), *for Appellants.*

BURTON H. HALL, New York, New York, *for Appellees.*

ROBERT E. DIZAK, Dizak and Lashaw, New York, New York, *for Amicus Curiae, Metropolitan New York Drywall Contractors Association, Inc.*

DAVID S. BARR, Barr & Peer, Washington, D. C., *for Amicus Curiae, International Brotherhood of Painters and Allied Trades.*

MESKILL, *Circuit Judge:*

Defendants below, the Operative Plasterers' and Cement Masons' International Association of the United States and Canada ("Plasterers") and two of its locals appeal from an order of the United States District Court for the Southern District of New York, Metzner, *J.*, which granted a preliminary injunction in favor of plaintiffs Drywall Tapers and Pointers of Greater New York, Local 1974 ("Painters") and certain of its individual members which, in general, would require the removal from the perform-

ance of any work involving taping or pointing of drywall surfaces at any jobsite wherever located of any members of the defendants. This Court granted a stay of the injunction and expedited argument of the appeal and, upon hearing argument on April 28, 1976, we continued the stay pending our determination of the appeal. We now affirm the district court's decision.

This appeal stems from a jurisdictional dispute about job assignments for a prefinishing aspect of construction work. Basically, the argument centers around "Sta-Smooth," a taping and pointing material, and whether its use falls within the work province of painters or plasterers. Both unions involved herein, as members of the Building and Construction Trades Department of the AFL-CIO ("Department"), are bound by its arbitral and administrative machinery. In 1947, a decision of record[1] by the Department assigned work by the nature of the material used—plasterers did work involving plaster materials, and painters did work requiring adhesive materials; since in 1975, a local arbitration board characterized "Sta-Smooth" as a plaster material, if the 1947 rule still governs, the application of "Sta-Smooth" would be plasterers' work. In 1961, however, a Memorandum of Understanding ("Memorandum"), signed by both the Plasterers' and Painters' internationals and binding on their locals, provided that all pointing and taping of drywall, regardless of the material used, is painters' work so long as the surfaces were not to receive plaster or acoustical finishes; the Memorandum further stated that it superseded all prior understandings. The two unions hotly dispute whether the 1961 Memorandum is still viable.

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1 This decision is reported in the "Green Book," Plan For the Settlement of Jurisdictional Disputes in the Construction Industry, at pp. 144-145.

The construction industry has established procedures for the settlement of jurisdictional disputes.[2] The dispute is first heard by a local board, here the Executive Committee of the Building Trades Employers' Association of the City of New York ("BTEA"), whose decision is appealable to the Impartial Jurisdictional Disputes Board ("Disputes Board") of the Department. A decision rendered by the Disputes Board may be appealed to the Appeals Board of the Department, whose decision is final. Finally, the Joint Administrative Committee, overseer of both the Disputes and Appeals Boards, may certify repetitive issues for resolution by the international unions, and, in the event that no settlement is reached in ninety days, then to a Hearings Panel for a national decision binding on all unions. As Judge Metzner aptly noted, "[i]t is clear from this highly-developed and sophisticated arbitration structure that no jurisdictional dispute between members of the Department should ever reach the courts."

The dispute involved herein has been before the BTEA, which held, in 1975, without mention of the 1961 Memorandum, that "Sta-Smooth" was a plaster material and that its application was plasterers' work. The appeal of this decision to the Disputes Board was at first allowed and then revoked because the Painters had initiated arbitration against an employer, allegedly in violation of the Department's constitution. Prior to this time, during a three-month period in 1973, the Disputes Board had resolved at least ten separate jurisdictional controversies by relying on the 1961 Memorandum. In December 1973, the Joint Administrative Committee referred the matter to the presidents of the international unions to settle what

2 *See,* Constitution of the Building and Construction Trades Department AFL-CIO; Plan for the Settlement of Jurisdictional Disputes In the Construction Industry.

had become a repetitive question; during the interim, the Committee instructed the Disputes Board to defer action on appeals involving this issue. After this latter ruling was protested by both sides to the instant dispute, the Joint Administrative Committee, in January 1974, assured the Painters that it would consider the matter at its next meeting. Since no further action has resulted, the Disputes Board has continued to defer all appeals involving this issue. The Joint Administrative Committee has not referred the question to the Hearings Panel for a national decision.

On August 28, 1975 plaintiffs filed a complaint in the United States District Court alleging that defendants had breached the 1961 Memorandum by asserting jurisdiction over work which properly should be assigned to Painters. Federal jurisdiction was based on § 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a).[3] Plaintiffs sought, *inter alia,* specific performance of the Memorandum and an injunction restraining defendants from assuming painters' work. The district court initially concluded that the issue of the present applicability of the Memorandum was best decided under existing union administrative machinery and directed both locals to petition the Joint Administrative Committee for referral to the Hearings Panel. Judge Metzner ruled that the parties' motions could be renewed if the unions did not cooperate or if the Department failed to follow its own plan. On December 11, 1975, the Painters, following the mandate of the court, applied to the Joint Administrative Committee

3 29 U.S.C. § 185(a) states in material part:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

for the necessary action but no action was taken by that Committee. The Plasterers evidently did not join the Painters' efforts to resolve the dispute within the union framework. Plaintiffs then renewed their motion for a preliminary injunction. Defendants cross-moved for summary judgment, alleging the plaintiffs' failure to exhaust contractual remedies. Plaintiffs answered with their own motion for partial summary judgment.

On March 5, 1976, the district court issued an opinion granting the preliminary injunction but found summary judgment for either side inappropriate, since substantial factual matters remained unresolved. Judge Metzner found that repeated reliance on the 1961 Memorandum by the Disputes Board indicated the continuing viability of that document and, thus, the likelihood that plaintiffs would ultimately succeed on the merits. He further found that compliance by the Painters with the earlier order of the court constituted exhaustion of administrative remedies within the AFL-CIO's Building and Construction Trades Department. On March 12, Judge Metzner issued an order that required Plasterers to remove its members from jobsites, "whersoever located," that involved taping and pointing of drywalls by plasterers.

On appeal, Plasterers claim that the district court lacked jurisdiction to issue an injunction; they also assert, assuming jurisdiction was proper, that the court abused its discretion by granting the injunction and that, in any case, the scope of the order appealed from is too broad.

The initial issue for our consideration is whether the Memorandum contested here comes within the terms of § 301(a) of the LMRA, which vests jurisdiction in the district courts for suits alleging "violation of contracts . . . between any . . . labor organizations [representing employees in an industry affecting commerce]." It is well

established that § 301(a) comprehends "other labor contracts besides collective bargaining" agreements. *Retail Clerks* v. *Lion Dry Goods,* 369 U.S. 17, 26 (1962) (strike settlement agreement). *See also, Abrams* v. *Carrier Corporation,* 434 F.2d 1234 (2 Cir. 1970), *cert. denied sub nom. United Steelworkers of America, AFL-CIO* v. *Abrams,* 401 U.S. 1009 (1971) (union charter and bylaws); *Local 33, Int. Hod Carriers, etc.* v. *Mason Tenders, etc.,* 291 F.2d 496 (2 Cir. 1961) (longstanding custom and practice); *Parks* v. *International Brotherhood of Electrical Wkrs.,* 314 F.2d 886 (4 Cir.), *cert. denied,* 372 U.S. 976 (1962) (constitution of international union); *International Brotherhood of Firemen and Oilers* v. *International Ass'n of Machinists,* 338 F.2d 176 (5 Cir. 1964) (no-raid agreement); *United Textile Workers* v. *Textile Workers Union,* 258 F.2d 743 (7 Cir. 1958) (no-raid agreement). Enforcing freely negotiated contracts between labor organizations both minimizes disruption of interstate commerce and encourages the voluntary resolution of inter-union disputes. We hold that the Memorandum in question here clearly falls within the literal terms and policy objectives of § 301(a). It is an agreement of definite content negotiated by two international unions to resolve work assignments within the construction industry in an effort to prevent labor warfare.

The remaining jurisdictional question is whether the anti-injunction provisions of the Norris-LaGuardia Act precluded the district court from enjoining the activities claimed to breach the Memorandum. Plasterers argue that, § 301(a) notwithstanding, since a work assignment dispute falls within the Norris-LaGuardia Act's definition of a "labor dispute," 29 U.S.C. § 113(c),[4] the district court

4 29 U.S.C. § 113(c) states:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing,

lacked jurisdiction to issue the injunction, 29 U.S.C. §§ 101, 104(b).[5] We cannot support Plasterers' narrow view of these statutes.

In *Boys Markets* v. *Clerks Union,* 398 U.S. 235, 249-250 (1970), the Supreme Court stated that the courts must accommodate the "seemingly absolute terms of the Norris-LaGuardia Act, and the policy considerations underlying § 301(a). . . . [C]onsideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." The Court also noted that, although the Norris-LaGuardia Act had been intended to curb the federal courts' misuse of injunctive powers in labor-management controversies, even as originally enacted the prohibition against federal injunctions was not absolute. Furthermore, as the power of unions and management assumed greater balance, Congress shifted its legislative focus to encouraging administrative techniques promoting the peaceful resolution of industrial disputes. 398 U.S. at 250-251. *See also, C F & I Steel Corp.* v. *United Mine Workers of America,* 507 F.2d 170 (10 Cir. 1974).

or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

5 29 U.S.C. § 101 states in pertinent part:

"No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

29 U.S.C. § 104(b) states in pertinent part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (b) Becoming or remaining a member of any labor organization or of any employer organization . . . ."

In *National Association of Letter Carriers* v. *Sombrotto,* 449 F.2d 915, 919 (2 Cir. 1971), this Court noted that § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, restricted federal jurisdiction "only in certain specified instances, particularly with regard to the enjoining of strikes, the joining of labor unions and the lawful aid to persons engaged in such activities." The policy section of that Act, 29 U.S.C. § 102, stresses the worker's "freedom of association, self-organization, and designation of representatives of his own choosing. . . ." Despite Plasterers' efforts to argue otherwise, the dispute in this case simply does not fall within the abuses which the Norris-LaGuardia Act was enacted to prevent. The injunctive relief sought here will not infringe upon the workers' organizational or bargaining rights but will instead enforce a work assignment agreement negotiated by the unions themselves. Since the conduct enjoined here does not fall within the specific provisions of the Norris-LaGuardia Act, the district court has jurisdiction to grant injunctive relief. *National Association of Letter Carriers* v. *Sombrotto, supra; Retail Clerks Union Local 1222* v. *Alfred M. Lewis, Inc.,* 237 F.2d 442 (9 Cir. 1964); *Parks* v. *International Brotherhood of Electrical Wkrs., supra.*

Finally, Plasterers contend that even if jurisdiction existed to grant injunctive relief, the district court erred by not complying with the procedural requirements of § 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107,[6] or, if that

6 29 U.S.C. § 107 in pertinent part requires that the court hear "the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered," and that the court make certain findings of fact, i.e., "that unlawful acts . . . have been committed and will be continued unless restrained . . . that substantial and irreparable injury to complainant's property will follow; that . . . greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of

Act does not apply, the requirements for a preliminary injunction of Rule 65, Fed. R. Civ. P. These requirements mandate that the injunction issue only after the court has heard testimony in open court and made certain findings of fact. We find no merit in this argument. The obvious purpose of the hearing requirements is to prevent grants of injunctions on ex parte applications and to ensure that relief follows only after consideration of all facts and arguments deemed important by the parties. In the present case, both sides submitted voluminous affidavits prior to each of Judge Metzner's decisions. Appellants were obviously content to rest on that evidence, as they never requested a further hearing. Finally, the question of the validity of the 1961 Memorandum was not a question that would be subject to greater elucidation by live testimony. The viability of the Memorandum depended on whether the parties and the arbitrators who resolved such disputes had recently relied on the Memorandum in their decisions. Thus the documentary evidence presented to Judge Metzner by both sides was sufficient to satisfy the hearing requirement and enable the court to decide whether an injunction should issue.

Painters were therefore entitled to injunctive relief upon a demonstration that they would likely succeed on the merits, that the balance of hardship favors them, and that the public interest would be served by issuance of the injunction. *See United States* v. *City of New Haven,* 447 F.2d 972 (2 Cir. 1971).

We find no error in Judge Metzner's decision that continued reliance by the Disputes Board on the 1961 Memorandum suggests that plaintiffs will ultimately prevail

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relief; that complainant has no adequate remedy at law; and that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

in proving the continuing viability of that document. We further agree with the district court's finding that appellants' disregard of the court's previous order to petition within the union's arbitral framework to resolve this dispute is a significant factor to be considered in determining whether to issue this injunction. Only the Painters sought to implement the court's directive, causing the district court to note that it was "at a loss to understand the failure of defendants [Plasterers] to join in trying to resolve this matter . . . especially in view of the court's direct mandate." We can only conclude that it benefits Plasterers to keep the issue unresolved, since they can then continue to assert jurisdiction over the disputed work assignments; their quest for ambiguity has been aided by the unwillingness of the union hierarchy to decide the issue. The failure of Plasterers so to comply with Judge Metzner's order strongly militates against their request for a denial of the injunction in the district court or for further relief from this court.

The balancing of hardships tips heavily in favor of granting the injunction. While the parties disagree concerning the number of plasterers who will be adversely affected by the injunction, at this preliminary stage it is unnecessary to determine which side has presented the more accurate statistic. Whatever the number, the fact remains that a similar number of painters are being affected under the alleged usurpation of their jurisdiction. Certainly there was sufficient evidence to support a finding of irreparable injury to Painters from their loss of employment opportunities, loss of bargained-for benefits (safety conditions, benefits and wages were being diminished under "sweetheart" contracts negotiated by Plasterers), and diminution of the Painters' ability to represent its members. The inflexibility of the Department's

machinery for resolving this inter-union dispute also leaves the Painters without any opportunity to determine finally the merits of their claims that their work jurisdiction is being diminished contrary to agreement.

Finally, we find that the order issued by Judge Metzner was of proper scope. That order required Plasterers to remove its members from pointing and taping drywall surfaces "wheresoever located." While this order covers an unlimited geographical area, it only reflects the universality of the 1961 Memorandum that governs work jurisdiction in such cases. Indeed, there is evidence in the record that Plasterers have asserted jurisdiction over the work at issue in areas outside New York City where this dispute originated. Since this action has been brought on behalf of the class of all painters who might be deprived of their rightful work province, the district court acted within its proper discretion in entering such a broad order.

Accordingly we affirm the order of the district court, vacate the stay of the injunction, and direct that the mandate issue forthwith.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

76-7108

No. 1075 September Term, 1975

Docket No. 76-7108

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

and

CHARLES LONG, PASQUALE DE ROSA, ALBERT ZAPPY, HARRY EDWARDS and ANTHONY DEL GAIS, each of them individually and on behalf of all other persons, members of Local 1974 working or seeking work as drywall tapers within the jurisdiction of such labor organization, similarly situated,

Plaintiffs-Appellees,

v.

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, OPERATIVE PLASTERERS LOCAL 60, OPERATIVE PLASTERERS LOCAL 202, and OPERATIVE PLASTERERS LOCAL 852,

Defendants-Appellants.

Before: LUMBARD, WATERMAN and MESKILL, Circuit Judges.

It is ORDERED by the Court sua sponte that the last two paragraphs on page 4240 of the opinion of June 18, 1976, in the above entitled case be deleted and replaced as follows:

"Appellants also contend that the order issued by Judge Metzner was of improper scope because it exceeded the relief sought and affected entities which have never been participants in the instant proceedings. That order, which required Plasterers to remove its members from pointing and

taping drywall surfaces 'wheresoever located,' covered an unlimited geographical area. Clearly the appellees in this action represented Local 1974 and its members who were working or seeking work as drywall tapers within the territorial jurisdiction of the local, an area comprising the five boroughs of New York City and certain parts of Nassau County. The requested injunctive relief specified restraint of Locals 60, 202 and 852 of the Plasterers' International Association, locals which function in the New York City area. Deeming it proper to narrow the scope of the district court's order to comport with the parties involved and the relief sought, we thus limit its force to the geographical area within the jurisdiction of Local 1974.

Accordingly, we affirm the order of the district court, as modified, vacate the stay of the injunction, and direct that the mandate issue forthwith."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-779

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974, *et al.*,
Petitioners,

v.

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, OPERATIVE PLASTERERS LOCAL 60, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION [1]

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Petitioner and respondent labor organizations are contractually bound to resolve work jurisdictional disputes between them in accordance with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry established under the Constitution of the AFL-CIO's Building and Construction Trades Department. A

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[1] Throughout this Brief the following abbreviations will be used: "Pet." will refer to the Petition for Certiorari; the opinions of the Court of Appeals and the District Court will be cited to the Appendix to the Petition (*e.g.*, "Pet. 8a.") "J.A." will refer to the Joint Appendix in the Court of Appeals in this case.

Hearings Panel, the highest tribunal established under that Plan, after hearing both unions and the respective affected employers of their members, rendered an award allocating the work in question and allowed no damages to petitioners.

The question presented is whether the two courts below erred in determining that the Panel acted within its authority under the Plan and that its award foreclosed any claim by petitioners for damages arising out of the dispute.

COUNTERSTATEMENT OF THE CASE

A. The Final and Binding Plan Under Which the Challenged Award Was Rendered

The Petition for Certiorari asks this Court for further review of an arbitration award which has already been approved by the District Court and by a unanimous Court of Appeals. The award resolved a work jurisdictional dispute between the union petitioner, a New York City local union affiliated with the International Brotherhood of Painters and Allied Trades ("Painters International"), and the respondent New York City locals affiliated with the Operative Plasters' and Cement Masons' International Association ("Pasterers' International").[2] The award was rendered by a Hearings Panel established under the "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry" (the "Plan"). Because the Painters International and the Plasterers' International are members of the Building and Construction Trades Department of the AFL-CIO (the "Department") the local unions are required, under Article X of the Department's Constitution, to resolve jurisdictional disputes between them in accordance with the Plan. Article X expressly declares:

> *Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.* (Pet. 8a, n.3, Court's emphasis.)

[2] The Plasterers International was also named a defendant and is a respondent.

Article VII, Section 2, of the Plan states:

> (a) The Department and each of its affiliated Unions agree that all cases, disputes or controversies involving jurisdictional disputes and assignments of work arising hereunder shall be resolved as provided herein and shall comply with the decisions and awards of the Board, or Hearings Panel established hereunder. (Pet. 8a, n.4.)

And Article VII, Section 2(h), states:

> (h) It is further agreed that, if the parties hereto comply with all of the provisions of this Agreement relating to Article VIII, they shall be relieved of all other liability arising therefrom . . . (*id.*)

The Plan establishes three separate bodies. The first, vested with overall responsibility for administration of the Plan, is the Joint Administrative Committee (the "JAC"), composed of four labor representatives chosen from the Department and four management representatives chosen from the signatory employer associations (J.A. 63). The second body is the Impartial Jurisdictional Disputes Board (the "Disputes Board"), whose three members are selected by the Joint Administrative Committee (J.A. 63). The third and final body contemplated by the Plan is the Hearings Panel, which may be convened specially from time to time to decide particular disputes, composed of two union general presidents appointed by the Department and two employer representatives selected by the signatory employer associations and chaired by an Impartial Umpire appointed by the JAC (J.A. 70).

Article IX of the Plan provides that if a jurisdictional dispute arises in a locale where there is in existence a local board of construction industry union and employer representatives recognized by the Plan, the dispute shall first be submitted to that local board (J.A. 70). The

local board's decision may then be appealed to the Disputes Board, which may also hear any dispute in the first instance where no local board exists. Above the Disputes Board in the Plan's hierarchy is the Hearings Panel, which may hear cases referred to it by the JAC or the Disputes Board itself (J.A. 70). There is no further appeal from such a decision of a Hearings Panel; thus, in the District Court's words, the Hearings Panel is the "highest god" in the labor movement for deciding jurisdictional disputes among construction unions. (J.A. 505).

B. The Instant Jurisdictional Dispute and the Proceedings to Resolve It

1. In March, 1975, the Painters local requested arbitration before New York City's local board of its dispute with Plasterers over use of "Sta-Smooth" in pointing and taping of drywall. At the hearings before the local board, the Plasterers argued they were entitled to the work by virtue of a "Decision of Record" issued by the Department in 1947; the Painters argued the work was theirs under a 1961 "Memorandum of Understanding," to which Painters and Plasterers were parties. The New York City board ruled for the Plasterers (Pet. 4a-5a). The Painters appealed to the Disputes Board. Contrary to what is incorrectly asserted at Pet. 6, the Disputes Board did not refuse to hear the case because of any "1973 directive." The Disputes Board expressly agreed in July, 1975, to hear the case, but ultimately refused after the Painters ignored the Board's repeated requests to drop efforts to establish their right to the work through other private arbitration proceedings to which the Plasterers were not a party (Pet. 5a). For obvious reasons, such unilateral efforts to establish jurisdiction are forbidden under the rules of the Plan. (J.A. 92a).

2. Subsequently, petitioners filed this action, seeking, among other things, damages for alleged breach of the

1961 Memorandum of Understanding. At the same time, they requested a preliminary injunction restraining Plasterers from asserting jurisdiction over the work in question. In originally denying the request for an injunction, the Court directed the parties to request the JAC to convene a Hearings Panel to resolve the recurring pointing and taping issue. (J.A. 308a).[3] Such an injunction was ultimately granted because, as the Court subsequently explained, it perceived a "breakdown" in the procedures required to resolve the controversy under the Plan (Pet. 15a).

3. A Hearings Panel to resolve the dispute was ultimately established, and two separate hearings were held at which the present parties and employers of their members were heard. The instant dispute was only one of many which had occurred over the years throughout the country between painters and plasterers regarding pointing and taping of drywall surfaces (Pet. 4a). On March 1, 1978, the Panel issued its decision. Rejecting the respective contentions of both parties, it held that there was no inconsistency between the 1947 Decision of Record and the 1961 Memorandum of Understanding and that neither document exclusively controlled assignment of the work. The 1961 Memorandum, the Panel held, was an attempt to clarify the 1947 Decision in the light of intervening technological changes (Pet. 6a). It allocated the pointing and taping of drywall between the Painters and the Plasterers on the basis of whether the drywall surfaces are, or are not, to receive plaster, acoustical or imitation acoustical finishes.[4]

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[3] The District Court's decision granting the request for an injunction is not reproduced in the Petition, but appears at J.A. 371a. On respondents' appeal, the Court of Appeals affirmed the injunction against the Plasterers' claiming the work, but limited it to the New York City area. (Pet. 19a-32a).

[4] The Hearings Panel decision on the pointing and taping of drywall held:

[Footnote continued on page 6]

Intending its decision to bring the longstanding controversy over pointing and taping to an end, the Hearings Panel held also that its decision "supercede[d] and render[ed] moot all controversies arising out of past assignments" and that it "contain[ed] full and final relief for all claims, both past and present, of all persons affected by this controversy and no further relief whatsoever is warranted" (Pet. 6a).

4. Shortly thereafter, respondents moved to dismiss the complaint and dissolve the preliminary injunction, arguing that the Panel's decision had completely resolved the controversy. While petitioners readily accepted the Hearings Panel's award as a determination in their favor of the jurisdictional dispute which had given rise to this action, they opposed respondents' Motion on the theory that the Panel had exceeded its authority by declaring all past claims moot and denying further relief. The District Court rejected petitoiners' argument as "clearly contrary" to the Plan. The District Court found that the Panel had the authority to dispose of the dispute as it had and that its decision was binding on the parties (Pet. 13a-16a). On petitioners' Motion for Reargument the District Court reaffirmed its decision (Pet. 17a-18a).

The Court of Appeals for the Second Circuit unanimously affirmed the District Court's decision. A petition for rehearing and for rehearing *en banc* brought by the petitioners was denied without dissent.

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[4] [Continued]

(1) All pointing and taping, regardless of material used, is painters' work, provided the drywall surfaces are not to receive plaster, acoustical or imitation acoustical finishes.

(2) Pointing and taping, regardless of material used, of drywall surfaces which are to receive plaster, acoustical or imitation acoustical finishes shall be the work of plasterers.

(3) The surface produced by the application of the same plaster pointing material as used in the pointing and taping of the joints to the entire drywall surface for the purpose of producing a uniform surface compatible with the pointed and taped joints shall be considered a plaster finish, and the pointing and taping in connection therewith shall be the work of plasterers.

REASONS FOR DENYING THE WRIT

1. Petitioners' contention that the decision below "is in conflict with this Court's decisions in the *Steelworkers* Trilogy" (Pet. 10)[5] rests on a false description of that court's reasoning. Petitioners assert that the court below "implicitly acknowledged the Panel's excess of authority but held that judicial approval thereof is mandated by the national labor policy." But the court neither said nor implied that the Hearings Panel lacked jurisdiction. Petitioners' implication rests entirely on a truncated version of a sentence from the court's opinion which begins as follows: "We find that, notwithstanding the long delays and the maladministration of the Plan, . . ." (Pet. 8a). Thus, the court did not acknowledge any lack of jurisdiction in the Hearings Panel, but only that that jurisdiction had not been exercised with appropriate dispatch. Even more significantly, in the sentence immediately following that from which petitioners quote, the court made plain that it well understood its responsibility:

> In so doing we are not unmindful of our obligation to give "meaningful" judicial review to the questions of whether an arbitral panel exceeded its authority; [citing the *Steelworkers* Trilogy]; but we also note that the function of the court is very limited when the parties, as in the present controversy, have agreed to submit questions of contract interpretation to an arbitrator or Hearings Panel, as the case may be. (Pet. 8a-9a.)

Petitioners do not deny that this is a correct statement of the role of the courts as established in the Trilogy and its progeny. Thus, the controversy between the parties boils down to the question whether the courts below erred in applying that standard when they reviewed this particular decision of the Hearings Panel. And that question is not conceivably of sufficient general

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[5] The cases are: *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Mfg. Co.*, 363 U.S. 593.

significance to warrant the attention of this Court, but is strictly limited to the facts of this particular case. To be sure, petitioners do strain to endow this case with importance by resort to the *ipse dixit* that there has been a "substantial increase, in recent years, of union jurisdictional disputes, especially in the construction industry." (Pet. 14.) Even if this wholly unsupported assertion were correct, and we do not know it to be so, peittioners' position would not be advanced. For it is petitioners' position which would, if sustained, exacerbate industrial strife by undermining the method which the construction industry unions have adopted for avoiding and peacefully resolving jurisdictional disputes.[6] The expectation of finality, subject to only limited judicial review, is, as this Court has recognized since the *Steel-*

[6] Petitioners argue that the "national policy favoring submission of union jurisdictional disputes to arbitration derives not from [§ 203(d) of the LMRA, 29 U.S.C.] § 173(d) but from § 10(k) of the National Labor Relations Act as amended" (Pet. 13) and argue further that the standards under these provisions differ materially. Since none of the questions presented in the petition raises the issue whether the court below erred in holding that § 203(d) was applicable, this argument is evidently an afterthought. It is wholly devoid of merit, if not actually self-defeating. The proposed distinction between "final adjustment" in § 203(d) and "voluntary adjustment" in § 10(k) is even facially plausible only until it is remembered that § 203(d) encourages "final adjustment *by a method agreed upon by the parties*" (our emphasis), which, of course, means a voluntary method. Sections 203(d) and 10(k) are not mutually exclusive, as petitioners would have it, but embody a single policy which prefers the resolutions of voluntary private tribunals to those of the courts and other government agencies. This is illustrated by the very case which petitioners cite, *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, which relied on the policy of § 10(k) as well as that of § 203(d) in directing an employer to arbitrate under a contractual grievance procedure a controversy which the court assumed (in that portion of its decision) was a jurisdictional dispute which would be subject to § 10(k). Compare *id.* at 264, n.3 (quoting § 10(k)) with *id.* at n.4 (quoting § 203(d)). And the notion that § 10(k) envisions broader review of awards than that accorded under § 203(d) is wholly baseless. Indeed, when the parties to a jurisdictional dispute agreed to such a method of adjustment, the NLRB, to which § 10(k) is addressed, is absolutely foreclosed from determining the dispute, it is not empowered to provide even limited review.

workers Trilogy, a vital part of the bargain when parties agree to submit their controversies to private arbitration as a substitute for economic action.[7]

Even as this Court does not ordinarily grant certiorari to determine whether a court of appeals properly applied the statutory standard of review of decisions of administrative agencies (*Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491), so certiorari should be denied where, as here, the only issue raised is whether a court of appeals correctly assessed an arbitration award when that court plainly and explicitly followed the standards laid down by this Court. These considerations militate even more strongly against review here, since the Court of Appeals' assessment of the record affirmed that of the District Court (*cf. United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2, and cases cited *id.*—"two-court rule").[8]

[7] See particularly *Enterprise Mfg. Co., supra*, 363 U.S. at 599.

[8] In thus stressing that the correctness of the Hearings Panel's decision is not an issue which qualifies this Court's consideration, we do not wish to leave the impression that that decision was even arguably wrong. On the contrary, petitioners' basic contention that the Panel was confined by the terms of petitioners' "submission" (see the phrasing of each of the questions presented, Pet. 3) is factually inaccurate and legally frivolous. The "submission" here was by direction of the District Court to both parties, see p. 5, *supra*, and was in no wise limited. Nor were petitioners free to exclude any issues from the arbitration, since as parties to the Plan they were contractually bound to resolve "all cases, disputes or controversies involving jurisdictional disputes and assignments of work" under the Plan. Moreover, it frequently happens that both sides to a litigation take extreme positions, either for strategic reasons or because they are blinded by their own partisan perspective from perceiving intermediate positions. Arbitrators could not perform their function, any more than could the courts, if they were impelled to choose one or the other extreme. Thus, as the court below said:

> . . . arbitral bodies or Hearings Panels, when attempting to do justice and to reach workable solutions, do not *a fortiori* exceed their authority because they take cognizance of issues beyond those presented by the parties. (Pet. 9a.)

2. As an additional ground for sustaining the decision of the Hearings Panel the Court of Appeals relied on the principle "articulated in *English* v. *Cunningham*, 283 F.2d 848, 850 (D.C. Cir. 1960), that 'courts will accept the correctness of an interpretation fairly placed on union rules by the union's authorized officials.'" (Pet. 9a) Again, petitioners do not disagree with the principle (which has been approved by other courts of appeals as well, see Pet. 9a-10a), but assert only that it was "misapplied" in the present case (Pet. 14-16). But again, that contention raises no issue "of importance to the public as distinguished from that of the parties * * *" (*Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 520, *quoting from Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393), and therefore does not warrant review.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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IN THE

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Petitioners,

—v.—

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-779

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Petitioners,

v.

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, etc., et al.,

Respondents.

PETITIONERS' REPLY BRIEF

Respondents argue (Br. 7, 9)* that the issue here "boils down" to whether the Court below correctly applied a general standard, admittedly correct, in its

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* Respondents' Brief ("Br."), though mailed to the undersigned January 10, 1980, was mailed without First Class designation and therefore did not arrive until January 22. Although another copy was mailed, express, arriving January 17, the late receipt has delayed this response.

review of the arbitral decision. They misapprehend what was decided below.

In the passage that Respondents quote (Br. 7), the Court below juxtaposed and conjoined with the word "but" two disparate principles in the following order*:

> (a) courts have an obligation to give "meaningful" review to the question whether an arbitrator has exceeded his authority, but
>
> (b) their reviewing function is "very limited" when the parties have agreed to submit issues of contract interpretation to an arbitrator.

By conjoining these two principles in this way the Court below has synthesized a new proposition of law, radically in con-

* As always with the conjunction "but," the order is crucial. To have conjoined the two principles in the opposite order would have led to a statement that, as the ensuing discussion will show, would have been correct, i.e.: a reviewing court's function is very limited but it must give meaningful review to the question whether an arbitrator has exceeded his authority. Such a correct statement would have compelled an opposite result below.

flict with the principles laid down in Steelworkers. The new proposition is that judicial scrutiny of whether an arbitrator has exceeded his authority should be "very limited." In substance, it is this new proposition that the Court below holds to be "mandate[d]" by Congress's national labor policy (Pet. App. 8a). In reality, by removing the issue of the arbitrator's excess from meaningful judicial review, the Court below has reached a result sharply contrary to Congress's labor policy.

Had the Court below acknowledged the source of the second principle that it conjoins with the word "but," the conflict between its new, synthetic proposition and the principles of Steelworkers would be manifest. The source is United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68, where this Court said:

> "The function of the [reviewing] court is very limited when the parties have agreed to submit all questions of con-

> tract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

Plainly, this Court meant the phrase, "very limited," to apply only to the scope of what may be judicially reviewed. Review should be limited to the issue whether the dispute was contractually submitted to the arbitrator. But judicial review of that issue should not be "limited." It should, instead, be "meaningful."

The distinction is crucial. Although the broad issue of union jurisdiction over drywall taping was submitted here to the Hearings Panel for decision under the Plan, no specific job disputes were submitted to it for decision. Nor could they be, for the Plan gives a Hearings Panel no power to decide any job dispute not already decided by the Impartial Board -- a point the Panel itself noted in its "Preliminary Rulings" (cf. Pet. 7-8, 11). Nevertheless, the Hearings

Panel purported to decide all past and present job disputes, including the New York City ones (which had not been decided by the Impartial Board). By so doing it exceeded its authority both under the Plan and under the submissions.

Therefore the question whether the Panel had exceeded its authority was presented to the courts below. But the Court of Appeals responded, not by observing that its reviewing role was limited to that question, but instead by declaring that the degree of its review of that question was "very limited." And on the basis of that new proposition it upheld dismissal of the action.

Thus, the issue presented here is a conflict between two opposing principles of law: between the principle of Steelworkers, that a court should give meaningful review to the question whether an arbitrator has exceeded his authority -- and the contrary proposition that a court should give only

"very limited" review to that question.

The conflict is fundamental to judicial review of arbitration proceedings and arbitration decisions. It should be resolved by this Court. For that reason, certiorari should be granted.

Respectfully submitted,

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